CF0000060383

XII-189 / (Jail)
C. J. P. R. 11/94/2,000

(2) Cr. A 2349/97

APPEAL OF PRISONER

Division Bench (Criminal)

No. 6085 Name बैजनाथ

Father's name पदेशी निवासी ग्राम देवरा थाना केवलारी पुरी

Residence पुरी (म.प्र.) Age 25

Sentenced to आजीवन कारावास On 22.8.97

Under section 302 भा.दं.वि. by माननीय अपर सेशन न्यायाधीश पुरी (म.प्र.)

S.T. No. 154/97

It is explained to the prisoner that if he states or wishes to be represented by legal practitioner the Appellate Court will not proceed with the base for seven days unless the legal practitioner appears. If the legal practitioner does not appear within seven days he may not heard at all. If the prisoner states that he does not wish to be represented by legal practitioner the court may proceed at once with the case and will not be obliged to give a hearing to any legal practitioner who should appear.

1 Date of Application for copy of Judgement .....

2 Date on which copy received .....

3 Date on which Appeal sent .....

4 Whether the prisoner wishes to be represented or not – Yes / No

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No. 6085 Name बैजनाथ S/o पदेशी

Confined in केन्द्रीय Jail रायपुर (म.प्र.)

No. 315/विधी/97 Dated 22/9/1997

Forwarded to the CHIEF JUDICIAL MAGISTRATE माननीय अतिरिक्त पंजीयक महोदय माननीय उच्च न्यायालय जबलपुर

togather which a copy of judgement or order passed in the case for favour of transmission to the proper Appellate Court.

संलग्न :- S.T. No. 154/97 की सत्यापित प्रतिलिपी

Superintendent
Superintendent (Jail)
Jail

Date of receipt in office

Date of receipt record to accompany the

Memo of Appeal to the Appellate court

No Dated 199

Forwarded to the

Date of receipt in Appellate Court

High Court of Madhya Pradesh
JABALPUR
Section
1 4 OCT 1997
Registration No. 216
Receipt Clerk

(P. T. O.)

H.P.R. (30)

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.2349 of 1997

Daulatram

- Versus -

State of Madhya Pradesh (now Chhattisgarh)

JUDGMENT FOR CONSIDERATION

Sd/-
L.C. Bhadoo
Judge
6.9.2005

HON'BLE MR. JUSTICE D.R. DESHMUKH

I agree.

Sd/-
Dilip Raosaheb Deshmukh
Judge
09.9.2005

POST FOR JUDGMENT ON 9TH SEPTEMBER, 2005

Sd/-
L.C.BHADOO
Judge
8.9.2005

(40)

HIGH COURT OF CHHATTISGARH, BILASPUR

Criminal Appeal No.2349 of 1997

Daulatram

- Versus -

State of Madhya Pradesh (now Chhattisgarh)

Present: -

Mr. Abhay Tiwari, Advocate: For the appellant.

Mr. Sachin Singh Rajput, Panel Lawyer: For the State/respondent.

DIVISION BENCH: -

HON'BLE MR. L.C. BHADOO AND

HON'BLE MR. DILIP R. DESHMUKH, JJ.

J U D G M E N T

(Delivered on 9th September, 2005)

The following judgment of the Court was delivered by *L.C. Bhadoo, J.*-

1. By this appeal under Section 374(2) of the Code of Criminal Procedure sent through the Superintendent, Central Jail, Raipur the accused/appellant-Daulatram has questioned the legality of his conviction under Section 302 of the Indian Penal Code and also the sentence awarded to him by the learned 5th Additional Sessions Judge, Durg in Sessions Trial No.154/97 whereby learned Additional Sessions Judge after holding the accused/appellant guilty under Section 302 of the I.P.C. for committing murder of his wife Sushila Bai by setting her on fire, sentenced him to undergo imprisonment for life and to pay a fine of Rs.2,000/-, in default of payment of fine to further undergo R.I. for 06 months.

2. The prosecution story in brief is that deceased Sushila bai was residing along with her husband i.e. the present accused/appellant in the house of Dukhulal Sahu (PW-4) as a

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tenant since last twenty days. On 8.2.1997 the landlord Dukhulal (PW-4) received information about fire in his house, on receiving this information he immediately rushed towards the room where the accused/appellant & deceased Sushila Bai were residing. On entering the room he saw that Sushila Bai was laying in burnt condition, however, at that time she was alive and was talking. He immediately called Naresh (PW-1), both of them went to the Police Station Mohan Nagar and informed about the incident regarding burning of Sushila Bai. Head Constable Ramadhar Singh (PW-10) recorded the same in Roznamchasanha (Ex.P-11) and based on that PW-11 Umesh Awasthi, Assistant Sub-Inspector registered a F.I.R. (Ex.P-12) at Crime No.38/97 under Section 307 of the IPC and reached to the spot. After inspection of the body of Sushila Bai, she was sent to the Government Hospital, Durg under Ex.P-7A, where Dr. V.K. Sao (PW-5) examined Sushila Bai and found that smell of kerosene oil was emanating from her body, her hairs of head & eyebrows, both the axillary regions and pubic hair were burnt and there were superficial and deep burn wounds on the body of Sushila Bai, her body was 100% burnt. Blood pressure was not recordable but she was in a conscious stage. On inquiry made by the doctor, Sushila Bai informed him that at about 11.00 a.m. her husband after pouring kerosene oil on her body set her on fire with a match-box stick. Doctor has also prepared the report (Ex.P-7) and advised for recording of dying declaration by the Executive Magistrate. Immediately, PW-7 Shri B.S. Thakur, Additional Tehsildar, Durg cum Executive Magistrate came and recorded the dying declaration of Sushila Bai vide Ex.P-8 at about 12.35 p.m. in which she disclosed him that she was set on fire by her husband after pouring kerosene oil on her

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body. Thereafter, she died, therefore, the offence converted under Section 302 of the IPC. The dead body was sent for post mortem examination, Dr. P.K. Agarwal conducted the post mortem and prepared the post mortem report (Ex.P-10) in which he opined that cause of death of Sushila Bai was shock resulting from extensive antemartem burns.

3. After completion of investigation, charge sheet was filed against the accused/appellant in the Court of Judicial Magistrate First Class, Durg who in turn committed the case to the learned Sessions Judge, Durg for trial from where learned 5th Additional Sessions Judge received the case on transfer. The prosecution in order to prove the offence against the accused/appellant examined in all 12 witnesses. On the other hand, learned Additional Sessions Judge recorded the statement of accused/appellant under Section 313 of the Cr.P.C. in which he denied the prosecution evidence, material appearing against him, he pleaded innocence and stated that he has been falsely implicated in the crime, as on the date when his wife was burnt he had gone to Village Thelka and when the police came there after two days then only he came to know about the incident.

4. Learned Additional Sessions Judge after hearing the arguments of Additional Public Prosecutor and counsel for the accused, convicted and sentenced the accused/appellant in the manner as indicated in the earlier part of this judgment.

5. We have heard Mr. Abhay Tiwari, learned counsel for the appellant and Mr. Sachin Singh Rajput, Panel Lawyer on behalf of the State/respondent.

6. Learned counsel for the accused/appellant argued that accused/appellant has been falsely implicated in the crime, as

on the date of incident he was not at his residence. The second limb of his argument was that the prosecution has failed to establish that the accused/appellant set Sushila Bai on fire with an intention to commit her murder. Therefore, according to him the offence does not travel beyond Section 304 Part-II of the I.P.C.

7. On the other hand, learned Panel Lawyer for the State supported the judgment of trial Court.

8. We have carefully scanned the prosecution evidence and other material available on record. There is no direct evidence in this case. Whole case rests on circumstantial evidence i.e. oral dying declaration made by deceased Sushila Bai before Dr. V.K. Sao (PW-5) and also the dying declaration (Ex.P-8) made before the Executive Magistrate Shri B.S. Thakur (PW-7).

9. Now we shall proceed to scrutinize the dying declaration, evidence and other material available on record and to see that whether on the basis of this evidence the prosecution has been able to establish the involvement of the accused/appellant in committing the murder of his wife as well as offence under Section 302 of the IPC. Section 32 of the Indian Evidence Act envisages the circumstances under which the statement made by a person on the verge of death becomes relevant and sub-section (1) of the same envisages that '*when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.*

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature

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of the proceeding in which the cause of his death comes into question.' In the matter of Laxman Versus State of Maharasthra reported in (2002) 6 Supreme Court Cases 710 the Hon'ble Apex Court held that:

> " The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in the existence of many circumstances which may affect their truth. The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court, in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite. In most cases, however, such statements are made orally before death ensues and is reduced to writing by someone like a Magistrate or a doctor or a police officer."

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Again in the matter of P.V.Radhakrishna V. State of Karnatka reported in AIR 2003 Supreme Court 2859 the Hon'ble Apex Court held that:

> " Clause (1) of Section 32 makes relevant what is generally described as dying declaration though such an expression has not been used in any statute. It essentially means statement made by a person as to the cause of his death or as to the circumstances of the transaction resulting in his death. The grounds of admission are: firstly, necessity for the victim being generally the only principal eye-witness to the crime, the exclusion of the statement might deflect the ends of justice; and secondly, the sense of impending death, which creates a sanction equal to the obligation of an oath. The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced by the most power considerations to speak the truth; a situation so solemn and so lawful is considered by the law as creating as obligation equal to that which is imposed by a positive oath administered in a Court of justice. The principle on which dying declaration is admitted in evidence is indicated in legal **maxim"nemo moriturus proesumitur mentiri- a man will not meet his maker with a lie in his mouth."**

The law regarding testing veracity of dying declaration is well settled; (i) As the admissibility of dying declaration is not subject to the cross-examination of the maker, a strictest scrutiny and closet circumspection is required by the Court before acting upon the same; (ii) the dying declaration must be voluntary, true and same should not be a result of tutoring or prompting or product of imagination; (iii) that the deceased was in a fit state of mind to give the statement i.e. alertness of mind, memory and understanding of what he/she is saying and had the opportunity to observe and identify the assailant are the matters which can be observed by the doctor/person recording the dying declaration. In order to

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ascertain whether the deceased was in a fit state of mind to give statement normally medical certificate in that respect is asked for, but in exceptional cases where doctor is not available and the person before whom the dying declaration orally or in writing was made is able to give evidence before the Court saying that the deceased was in a fit state of mind to give the dying declaration and same inspires full confidence of Court, in accordance with the settled principle of accepting dying declaration, then same can be accepted.

(iv) Even the dying declaration made before a police officer or doctor can also be accepted provided same inspires the confidence of Court on the settled principles of acceptance of dying declaration (2003 Supreme Court Cases (Cri) 561 State of Karnataka Versus Shariff): (v) the dying declaration can be oral or in writing or in adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite; (vi) the dying declaration must be coherent, consistent, competing with the facts and circumstances in which the offence was committed; (vii) the conviction can be based on a dying declaration without seeking corroboration of the same by any other evidence or material provided the same satisfies the conscious of Court and inspires full confidence of the Court on the basis of above quoted principles.

10. In the light of above principles, if we examine the evidence adduced by the prosecution in this case, Dukhulal Sahu (PW-4), owner of the house where the accused & deceased were living, has stated in his evidence that the deceased & accused were living in his house on rent, on receiving information on 7.2.1997 regarding fire in his house he rushed towards his house and saw that Sushila Bai was

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laying in burnt condition, then he reported the matter to the Police. Dr. V.K. Sao (PW-5), who is an independent witness, has stated in his evidence that when Sushila Bai was brought to the hospital in 100% burnt condition she was conscious and talking, smell of kerosene was emanating from her body and on inquiry she informed him that at about 11 am her husband after pouring kerosene oil on her body set her on fire with a stick of match box. Perusal of doctor's report Ex.P-7 shows that above statement was recorded in the report. PW-5 further stated that he immediately advised for recording of statement of Sushila Bai by some Executive Magistrate, accordingly, statement was recorded by PW-7 Shri B.S. Thakur, Additional Tehsildar, Durg cum Executive Magistrate and he gave the certificate (Ex.P-8) regarding fitness of Sushila Bai to give statement. As such, oral dying declaration was made by the deceased before the doctor PW-5 who is an independent witness. In the cross-examination of this witness learned counsel for the defence has not been able to elicit anything, which makes the evidence of this witnesses unreliable, untrustworthy or doubtful. Shri B.S. Thakur (PW-7), who recorded the dying declaration Ex.P-8, has very clearly stated in his evidence that he has started recording the evidence at about 12.35 p.m. at that time Sushila Bai was in a fit state of mind to give her statement and before starting he took the fitness certificate from the doctor and thereafter, he recorded the statement Ex.P-8. He has further stated that Sushila Bai gave her statement in Hindi and perusal of Ex.P-8 shows that Sushila Bai in clear terms stated that her husband poured kerosene oil from a tin and thereafter, set her on fire with a stick of matchbox. Even from the cross-examination of PW-7 Shri B.S. Thakur, the defence counsel has not been able to elicit anything regarding

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absence of accused/appellant from the scene of occurrence at the time when the deceased Sushila Bai was burnt or that Sushila Bai was not in a fit state of mind to give her statement or she was under influence of anybody therefore, the statement was not voluntary and true. In the statement recorded under Section 313 of the Cr.P.C. the accused/appellant has stated that at the time of incident he was not at the residence. In the first instance, the above statement of accused/appellant does not find support from any material on record and moreover, in the circumstances, there is no reason before the Court to disbelieve the dying declaration made by the wife of the accused/appellant, for the reason that there was no reason before the deceased Sushila Bai to implicate her husband in a false case that too in such a serious heinous crime in which life sentence is prescribed. Moreover, the dying declaration was made by the deceased before Dr.V.K.Sao (PW-5) immediately after the incident and there was no occasion for a third person to tutor the deceased nor there is such allegation. As has been mentioned above that from the cross-examination of Dr. V.K. Sao (PW-5) before whom the deceased made the oral dying declaration and PW-7 Shri B.S. Thakur, Additional Tehsildar cum Executive Magistrate, who recorded the dying declaration (Ex.P-8) learned counsel for the defence has not been able to bring on record any circumstances which lend credence to the defence raised by the accused/appellant regarding his absence from the scene of occurrence at the time of incident or that there was a reason before Sushila Bai to implicate her husband in a false case, therefore, we are of the considered opinion that on the principles laid down by the Hon'ble Apex Court in the judgments mentioned above the dying declaration made by deceased Sushila Bai inspires full

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confidence of the Court as the same was voluntary, true, consistent, competing with the circumstances on record and at the spot, therefore, there is no reason before the Court to discard the dying declaration of deceased Sushila Bai. As such, the trial court has rightly held the accused/appellant guilty for committing murder of his wife.

11. Now coming to second ground raised by learned counsel for the accused/appellant that the prosecution has not been able to establish that the accused/appellant set on fire Sushila Bai with an intention to cause her death. As per dying declaration & medical evidence, it is established that there was some quarrel between the accused/appellant and the deceased, thereafter the accused/appellant poured the kerosene oil on the body of Sushila Bai, set her on fire with a stick of match-box, she was burnt upto 100% and thereafter, the accused/appellant ran away from the scene of occurrence. Had the accused/appellant was not having intention to commit murder of his wife and if, in a fit of anger without having any intention to murder Sushila Bai she was set on fire then as a natural consequence after realizing the gravity of situation he ought to have tried to save Sushila Bai from burning upto 100%, on the contrary the accused/appellant ran away from the place of occurrence allowing the Sushila to die by burning. Therefore, these circumstances are sufficient to establish the fact that the accused/appellant intentionally set Sushila Bai on fire to cause her death.

12. In the result, we do not find any infirmity in the finding of trial court. The appeal is without merit, same is liable to be dismissed and it is accordingly dismissed.

Sd/-
L.C.BHADOO
Judge
9th-9-2005

Sd/-
Dilip Raosaheb Deshmukh
Judge
09-9-2005

Roshan/-